

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

March 25, 2002

In Re: Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to Declare Unbundled Switching an Unrestricted Unbundled Network Element.

Docket No. 02-00207

ORDER REGARDING THE APPLICABILITY OF TENN. CODE ANN. § 65-5-209(d)

This matter comes before the Hearing Officer upon the filing of a *Petition to Open Contested Case Proceeding* ("*Petition*") by the Tennessee UNE-P Coalition ("*Coalition*").¹ In response to the *Petition*, BellSouth Telecommunications, Inc. ("*BellSouth*") filed the *Motion of BellSouth Telecommunications, Inc. to Dismiss Petition Pursuant to T.C.A. § 65-5-209(d) and to Strike Pre-Filed Testimony* ("*Motion to Dismiss*"). The issue for disposition herein concerns the applicability of Tenn. Code Ann. § 65-5-209(d) to this proceeding. For the reasons set forth below, the Hearing Officer finds that Tenn. Code Ann. § 65-5-209(d) is inapplicable to this proceeding.

I. Travel of the Case

On February 25, 2002, the Coalition filed its *Petition* with the Tennessee Regulatory Authority ("*TRA*" or "*Authority*"). The Coalition requests that the Authority convene a contested case to declare switching to be an unrestricted unbundled network element ("*UNE*").

¹ The Coalition includes: Access Integrated Networks, Inc.; Birch Telecom of the South, Inc.; Ernest Communications, Inc.; MCImetro Access Transmission Services, LLC; MCI WorldCom Communications, Inc.; NewSouth Communications Corp.; and Z-Tel Communications, Inc.

The Coalition contends, among other things, that it is entitled to the relief requested pursuant to Tenn. Code Ann. § 65-5-209(d) and Tenn. Code Ann. § 65-4-124.²

On February 26, 2002, at a regularly scheduled Authority Conference, the Directors appointed Director Melvin J. Malone to serve as the Hearing Officer to prepare this case for a hearing before the Directors.³

The Authority issued a *Notice of Filing* on March 1, 2002, directing BellSouth to file its response to the *Petition* on March 4, 2002, and directing the Coalition to file its reply to the response on March 7, 2002. On March 4, 2002, BellSouth filed its *Motion to Dismiss* arguing, in part, that Tenn. Code Ann. § 65-5-209(d) is, given the relief requested in the *Petition*, inapplicable.⁴ The Coalition filed its *Opposition to BellSouth Motion to Dismiss* addressing BellSouth's arguments against the applicability of Tenn. Code Ann. § 65-5-209(d) on March 6, 2002.

II. Issue Presented for Decision

As stated earlier, the Coalition requests in its *Petition* that the Authority convene a contested case to declare switching to be an unrestricted unbundled network element. The Coalition contends that its *Petition* satisfies the language of Tenn. Code Ann. § 65-5-209(d), which requires the TRA to set matters arising thereunder for hearing within thirty days and to

² Tenn. Code Ann. § 65-5-209(d) provides as follows:

If not resolved by agreement, the authority shall, on petition of the competing telecommunications services provider, hold a contested case proceeding within thirty (30) days to establish initial rates for new interconnection services provided by an incumbent local exchange telephone company subsequent to June 6, 1995, which rates shall be set in accordance with the provisions set forth in Acts 1995, ch. 408. The authority shall issue a final order within twenty (20) days of the proceeding.

³ *TRA Transcript of Proceedings*, TRA Docket No. 02-00207, p. 14 (Feb. 26, 2002).

issue a decision twenty days thereafter. BellSouth challenges the Coalition's contention that Tenn. Code Ann. § 65-5-209(d) applies to the relief sought in the *Petition*. Hence, the preliminary issue is whether the Authority is required to set a hearing on the *Petition* and issue a decision within the time frames set in Tenn. Code Ann. § 65-5-209(d).

III. Arguments of the Parties

a. The Coalition

In its *Petition*, the Coalition argues that Tenn. Code Ann. § 65-5-209(d) is the proper procedural vehicle for consideration of whether to “establish unrestricted local switching as a ‘new interconnection service.’”⁵ In its *Opposition to BellSouth Motion to Dismiss*, the Coalition maintains that it is seeking an “initial rate” for switching to the extent that it is asking the Authority to “require BellSouth to make switching available . . . where no rate is currently in place.”⁶ The Coalition emphasizes that “the only ‘rate’ in place [in downtown Nashville] for customers with more than three lines . . . is the anticompetitive, ‘market’ price unilaterally set by BellSouth.”⁷ Moreover, the Coalition asserts that its *Petition* represents a case of first impression before the TRA to designate a UNE under Tenn. Code Ann. § 65-4-124 and to establish a rate for that service pursuant to Tenn. Code Ann. § 65-5-209(d). The Coalition further contends that such a case is, in fact and in law, a proceeding to set an “initial rate” for that service as the term is used in the statute.⁸ Additionally, the Coalition asserts that “if switching were universally available as a UNE, it would be universally available at the UNE rates set by the Authority[.]”⁹

⁴ *Motion of BellSouth Telecommunications, Inc. to Dismiss Petition Pursuant to T.C.A. § 65-5-209(d) and to Strike Pre-Filed Testimony*, TRA Docket No. 02-00207, p. 2 (Mar. 4, 2002).

⁵ *Petition to Open Contested Case Proceeding*, TRA Docket No. 02-00207, pp. 1, 9 (Feb. 25, 2002).

⁶ *Opposition to BellSouth Motion to Dismiss*, TRA Docket No. 02-00207, p. 9 (Mar. 6, 2001).

⁷ *Id.*

⁸ *Id.* at 10.

⁹ *Id.*

Finally, the Coalition argues that the statute is applicable because it applies where there is no agreement and that, although BellSouth has agreements in place with each member of the Coalition, none of those agreements contain a “TRA-set rate for switching applicable where switching is currently unavailable as a UNE.”¹⁰

b. BellSouth

BellSouth argues that the statute was “designed for the inception of the . . . interconnection rate process” and does not apply because switching is a UNE “that has already been established and for which the Authority has already established rates.”¹¹ BellSouth further contends that local switching “is not a form of ‘interconnection,’ as that term is used in the Federal Act” and is instead a UNE.¹²

Moreover, BellSouth asserts that in order for the statute to apply, the Coalition must “show that it is seeking the establishment of ‘initial rates’ for switching” and that the Coalition cannot make such a showing because “initial rates for switching were established by the TRA pursuant to Order dated February 23, 2001 in Docket No. 97-01262.”¹³ BellSouth maintains that since an initial rate has already been set, Tenn. Code Ann. § 65-5-209(d) does not apply.¹⁴

Lastly, BellSouth proclaims that “switching is currently available in Tennessee both as an individual unbundled network element and also as part of the UNE platform.”¹⁵ BellSouth claims that “the Petitioners do not seek to have a new aspect of the network declared as an

¹⁰ *Id.* at 11.

¹¹ *Motion of BellSouth Telecommunications, Inc. to Dismiss Petition Pursuant to T.C.A. § 65-5-209(d) and to Strike Pre-Filed Testimony*, TRA Docket No. 02-00207, p. 6 (Mar. 4, 2002).

¹² *Id.* at 7.

¹³ *Id.*

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 9.

unbundled network element, but rather seek to address the circumstances under which the pricing for an existing UNE is applicable.”¹⁶

IV. Discussion and Analysis

Tenn. Code Ann. § 65-5-209(d) provides as follows:

If not resolved by agreement, the authority shall, on petition of the competing telecommunications services provider, hold a contested case proceeding within thirty (30) days to establish initial rates for new interconnection services provided by an incumbent local exchange telephone company subsequent to June 6, 1995, which rates shall be set in accordance with the provisions set forth in Acts 1995, ch. 408. The authority shall issue a final order within twenty (20) days of the proceeding.

By its plain language, Tenn. Code Ann. § 65-5-209(d) applies only in those instances where there is a failure to reach agreement and where it is subsequently requested that the Authority establish initial rates for new interconnection services.

In appraising the applicability of Tenn. Code Ann. § 65-5-209(d), there is the threshold matter of determining whether the Petitioners currently have an agreement with BellSouth with respect to rates for circuit switching. No party disagrees that it has a state-approved interconnection agreement currently in effect that contains rates for circuit switching.¹⁷ With respect to interconnection agreements, it is a long-settled matter that parties’ joint presentation for state approval of an interconnection contract signals to the Authority that the parties have, in fact, agreed to the terms of the contract. This presumption is particularly compelling since the Telecommunications Act of 1996 (the “Act”)¹⁸ provides relief to competing providers in

¹⁶ *Id.*

¹⁷ See *Opposition to BellSouth Motion to Dismiss*, p. 11 (“It is of course true that BellSouth has agreements in place with each member of the Coalition.”). See also *BellSouth’s Motion to Dismiss Petition*, p. 10. Notwithstanding the admission of the Coalition, it should be noted that Authority records do not reveal a current, state-approved interconnection agreement between Z-Tel Communications, Inc. and BellSouth. Further, Authority records indicate that Ernest Communications, Inc. is a reseller.

¹⁸ 47 U.S.C. § 151 *et seq.*

instances where an agreement, in any contract area covered under the Act, including rates, cannot be reached.¹⁹ Moreover, this Authority recognizes that parties are free to voluntarily execute, and have approved, agreements that are inconsistent with the standards set forth in Section 251 of the Act and with previous Authority Orders.²⁰ The sole qualifiers limiting such behavior is where agreements discriminate against telecommunications carriers not parties to the agreements or where it is found, after state review, that the implementation of the agreements is not consistent with the public interest, convenience, or necessity.²¹

The Coalition propounds two primary arguments in support of its position that there are no agreements in place with rates for circuit switching. First, the Coalition contends that the existing agreements do not contain a TRA-set rate for switching where switching is unavailable as a UNE.²² Second, the Coalition asserts that the agreements contain “market-based” rates for switching unilaterally established by BellSouth.²³ As a result, the Coalition concludes that “BellSouth cannot be taken seriously when it contends that there is no disagreement between the parties as to the appropriate rate.”²⁴

As noted above, parties are free to execute interconnection agreements that depart from established judgments and present the same for state approval. Conversely, parties are likewise free to execute contracts for terms, conditions, or rates that have not been previously deliberated. Consequently, it is erroneous to erect a syllogism that concludes that the mere absence of TRA intervention in mandating a term, condition, or rate invalidates or renders infirm an otherwise

¹⁹ 47 U.S.C. § 252.

²⁰ See *In Re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of The Telecommunications Act of 1996*, Order, TRA Docket No. 99-00948 (Feb. 11, 2002).

²¹ 47 U.S.C. § 252(e).

²² *Opposition to BellSouth Motion to Dismiss*, p. 11.

²³ *Id.* at 9.

²⁴ *Id.* at 11.

binding agreement.²⁵ Moreover, there is no support, at this juncture, that reasonably leads to the conclusion that the Petitioners' acceptance of BellSouth's "market-based" rate for switching, as evidenced by executed interconnection agreements, is, in reality, a disagreement between the parties for the purposes of determining the applicability of Tenn. Code Ann. § 65-5-209(d).

Accordingly, under the plain language of Tenn. Code Ann. § 65-5-209(d) and this agency's long-standing acknowledgement that a "meeting of the minds" has presumptively occurred when presented with executed contracts, the Hearing Officer concludes, on the issue at hand, that an agreement has been reached between the Parties with respect to rates for circuit switching. To conclude otherwise would promote the undesirable condition where subsequent disenchantment with the terms of an agreement could prove sufficient to invalidate a contractual commitment. In view of the Petitioners' failure to satisfy the threshold as discussed herein, there is no need to reach its additional arguments concerning the application of Tenn. Code Ann. § 65-5-209(d).

Nothing herein should be construed as addressing or deciding any issue beyond the appropriateness of proceeding in this matter under the language of Tenn. Code Ann. § 65-5-209(d).

V. Conclusion

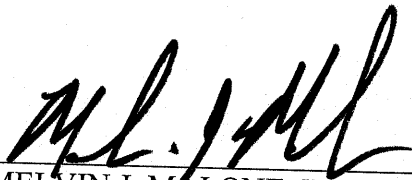
For the aforementioned reasons, the Hearing Officer finds that Tenn. Code Ann. § 65-5-209(d) is not applicable to this matter. Therefore, the time limits contained therein do not apply

²⁵ See *In Re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief, Initial Order of Hearing Officer*, TRA Docket No. 98-00118, pp. 20-21 (April 21, 1998) ("[T]his Authority should not serve as the conduit through which [a party] is allowed to circumvent and/or modify contractual obligations which it entered

to this case.

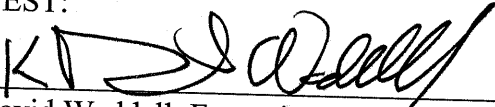
IT IS THEREFORE ORDERED THAT:

1. Tenn. Code Ann. § 65-5-209(d) is not applicable to this matter. This matter shall proceed under a schedule established by separate order of the Hearing Officer.



MELVIN J. MALONE, DIRECTOR
AS HEARING OFFICER

ATTEST:



K. David Waddell, Executive Secretary

into voluntarily.”). *See also* *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 101 (Tenn. 1999) (“[I]t is not the duty of courts of common law to relieve parties from the consequences of their own improvidence.”).